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IN THE
Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR,
BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS,
JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT,
AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF PROFESSOR THOMAS HEHIR, PROFESSOR MELODY B. MUSGROVE, AND MADELEINE WILL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are former U.S. Department of Education officials responsible for special education policy. *Amicus* Dr. Thomas Hehir is the Silvana and Christopher Pascucci Professor of Practice in Learning Differences at the Harvard Graduate School of Education. Dr. Hehir served as the Director of the Office of Special Education Programs under President William J. Clinton and has extensive experience implementing school district-level special education plans with the Chicago and Boston public school systems.

Amicus Dr. Melody B. Musgrove is Co-Director of the Graduate Center for the Study of Early Learning and Associate Professor of Special Education at the University of Mississippi. Dr. Musgrove served as the Director of the Office of Special Education Programs under President Barack Obama and previously served as a classroom teacher, school administrator, district special education director, assistant superintendent, and State Director of Special Education for the Mississippi Department of Education.

Amicus Madeleine Will served as the Assistant Secretary of the Office of Special Education and Rehabilitative Services under President Ronald Reagan. Ms. Will has more than thirty-five years of experience advocating for individuals with intellectual disabilities and their families and developing

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting to the Clerk letters granting blanket consent to the filing of *amicus* briefs.

partnerships of parents and professionals involved in creating and expanding high-quality education and other opportunities for individuals with disabilities. Since her adult son, Jonathan, was born with Down syndrome, she has been involved in disability policy efforts at the local, state, and federal levels. Ms. Will founded the Collaboration to Promote Self-Determination, a network of national disability organizations pursuing modernization of services and supports for persons with intellectual and developmental disabilities, so that they can become employed, live independently in an inclusive community, and rise out of poverty. She has also served as Vice President of the National Down Syndrome Society and Chair of the President's Committee for People with Intellectual Disabilities.

Amici have devoted their professional lives to working for the interests of students with disabilities. In various capacities, they have been responsible for both enforcing and complying with the statutory rights and obligations enacted by Congress for the benefit of students with disabilities and their families. Having been involved in the implementation of the federal statutes at issue in this case, *amici* have a special interest in providing the Court with a perspective based on decades of practical experience.

Amici believe that the decision of the court of appeals is contrary to the express terms of the statute and ignores the basic difference between the Individuals with Disabilities Education Act ("IDEA") — which creates an entitlement to a free appropriate public education and relies on elaborate and sometimes expensive administrative procedures for enforcement, with special education services or placement as remedies for students and parents — and § 504 of the Rehabilitation Act of 1973 and the Americans

with Disabilities Act of 1990 ("ADA") — which enact prohibitions on discrimination that may require different remedies.

SUMMARY OF ARGUMENT

I. The ADA and the Rehabilitation Act are broad anti-discrimination statutes that serve distinct goals and provide distinct remedies from those provided under the IDEA. The former are broad statutes that prohibit discrimination against individuals with disabilities, requiring reasonable accommodations to avoid such discrimination. The IDEA, by contrast, is designed to ensure that children with disabilities are provided the specialized instruction or related services needed to ensure a free appropriate public education. Many students with disabilities may require reasonable accommodations to avoid discrimination, without any need for the special education services that the IDEA requires. Indeed, the IDEA's predecessor statute was adopted against the backdrop of existing anti-discrimination law. And, after this Court's ruling in *Smith v. Robinson*, 468 U.S. 992 (1984), that the IDEA's predecessor statute was the exclusive means of seeking relief for claims involving rights of students with disabilities, Congress enacted 20 U.S.C. § 1415(*l*), which makes clear that the rights guaranteed by federal anti-discrimination laws are distinct and are separately enforceable from the IDEA.

The Sixth Circuit's contrary view ignores the plain language of the statute and leads to paradoxical results. Alleged discrimination against a student with a disability may not implicate whether the student receives a free appropriate public education. And remedies available to redress such discrimination may not be available under the IDEA. In such circumstances, it makes no sense to require exhaustion of

administrative remedies that are inapposite to the alleged discrimination. And such a requirement imposes an unfair burden on students receiving special education services under the IDEA, because a similarly situated student with a disability subject to identical discriminatory conduct and seeking the same remedy would not be subject to any such exhaustion requirement.

II. Based on their long experience working in the field of special education, *amici* see no risk that reading the statute according to its terms will risk any "flood" of litigation over alleged discrimination. Parents of students who require special education services are primarily concerned that their children receive those services, and they are typically aware that to achieve that end they must participate in the development of an Individualized Education Program ("IEP") and pursue administrative remedies in cases of disagreement. Plaintiffs in this case did not attempt to bypass that mechanism.

Furthermore, parents of children with disabilities — whether or not they are eligible for special education services — have available an alternative informal dispute resolution mechanism in cases of alleged discrimination. The Office of Civil Rights in the Department of Education ("OCR") has a four-decade history of enforcing the non-discrimination rights of students with disabilities. Parents can pursue complaints about discrimination with OCR without a lawyer; complaints are frequently resolved though informal negotiation and without litigation.

While *amici* believe that court litigation to address discrimination in schools will be relatively rare, they nevertheless agree with petitioners that preserving the distinct remedial schemes of distinct federal statutes will best serve the interests of students and educators.

ARGUMENT

I. THE ADA AND THE REHABILITATION ACT SERVE DIFFERENT GOALS AND PROVIDE DIFFERENT REMEDIES FROM THE IDEA

The ADA and the Rehabilitation Act, on the one hand, and the IDEA, on the other, are independent, distinct statutes that focus on different wrongs and provide different remedies. By imposing an exhaustion requirement that not only is non-statutory but also is in conflict with the express terms of the IDEA, the Sixth Circuit erred.

A. The ADA and the Rehabilitation Act Provide a Comprehensive Anti-Discrimination Mandate for Public Services and Entities

The ADA and the Rehabilitation Act are broad statutes that prohibit discrimination against people with disabilities. They impose an obligation on public entities and entities receiving federal financial assistance to avoid discrimination against all adults and children with disabilities, both within and outside the school context. The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), and Title II of the ADA prohibits any state or local government entity, including but not limited to public schools, from discriminating against a "qualified individual with a disability," *id.* § 12132. Similarly, § 504 of the Rehabilitation Act — enacted in 1973 — bars entities "receiving Federal financial assistance" (whether or not that entity is a public school) from discriminating against an "otherwise qualified individual with a disability." 29 U.S.C. § 794(a); *see School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987) (noting that the "basic purpose of § 504" is to ensure

that individuals with disabilities "are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others").

To effectuate their remedial non-discrimination policies, the ADA and the Rehabilitation Act establish a "reasonable modification" standard, meaning public entities must make "reasonable modifications to rules, policies, or practices" to accommodate persons with disabilities. 42 U.S.C. § 12131(2); *see also* 28 C.F.R. § 35.130(b)(7) (requiring that, under the ADA, public entities must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity"); *Tennessee v. Lane*, 541 U.S. 509, 517 (2004).

To show discrimination under Title II of the ADA and § 504, plaintiffs, including public school students and their parents, are *not* required to allege or prove that they were denied a free appropriate public education.[2] Rather, plaintiffs must show that (1) they have a qualified disability and (2) they were "excluded from participation in or [were] denied the benefits of the services, programs, or activities of a public entity, or [were] subjected to discrimination by any such entity" (3) "by reason of" their disability. 42 U.S.C. § 12132.

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[2] As petitioners explain, although the failure to provide a free appropriate public education may violate § 504 and the U.S. Department of Education's regulations implementing that statute, a school may violate general non-discrimination prohibitions even when it has met the IDEA's requirements. *See* Pet. Br. 8.

B. The IDEA Imposes Distinct Obligations on School Districts To Provide Special Services to Qualifying Students

The IDEA, which was originally enacted in 1975 as the Education for All Handicapped Children Act ("EHA"), ensures "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). Any State that accepts certain federal educational funding assistance must comply with its terms. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006). To be eligible for services under the IDEA, a student must (1) have a disability covered by the Act and (2) require specialized instruction and related services. *See* 20 U.S.C. § 1401(3). Because of this second criterion, some students with disabilities are not covered by the IDEA because they do not require specialized instruction.

Providing a qualified student with a disability with a free appropriate public education requires creating and following an Individualized Education Program ("IEP"). *See id.* § 1401(9)(D). A student's IEP must provide the student with a free appropriate public education that "meet[s] their unique needs and prepare[s] them for further education, employment, and independent living." *Id.* § 1400(d)(1)(A).[3] A team

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[3] The U.S. Department of Education recently issued guidance stating that "IEP goals must be aligned with grade-level content standards for all children with disabilities," because this will help ensure "that an IEP for a child with a disability includes instruction and supports that will prepare the child for success in college and careers." Letter from Michael Yudin, Ass't Secretary, U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Servs. & Melody Musgrove, Dir., U.S. Dep't of

that includes the student's parents, a regular education teacher, and a special education teacher develop the IEP for that student before the beginning of every school year. *See id.* §§ 1412(a)(4), 1414(d). The IEP describes the student's present academic and functional performance, measurable annual goals, and the educational services that will advance the student toward those goals. *See id.* § 1414(d)(1)(A).

The IDEA therefore is a grant of rights that — in requiring special education services for students with disabilities — is different from the anti-discrimination and reasonable accommodation requirements of § 504 of the Rehabilitation Act and the ADA. The predecessor to the IDEA, the EHA, was enacted after § 504 and against the backdrop of its prohibition on discrimination. In enacting the EHA, Congress thus would have assumed the existence of non-discrimination duties and remedies for their enforcement.

Indeed, after this Court held in *Smith v. Robinson*, 468 U.S. 992 (1984), that the EHA was the exclusive means of seeking relief for claims involving rights of students with disabilities, Congress enacted 20 U.S.C. § 1415(*l*) to clarify that the rights guaranteed by the EHA (now the IDEA) and other federal laws protecting such students are distinct and are separately enforceable. That section expressly states that nothing in the IDEA "shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of

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Educ., Office of Special Educ. Programs at 1, 3 (Nov. 16, 2015), *available at* https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.

children with disabilities." 20 U.S.C. § 1415(*l*) (citations omitted). To be sure, parents "seeking relief that is . . available under" the IDEA — that is, parents presenting complaints about "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education," or placement of the student in an interim alternative educational setting — must exhaust administrative remedies with the State before filing a lawsuit. *Id.* § 1415(b)(6), (f), (g), (k), (*l*). But parents are not otherwise required to exhaust administrative remedies before vindicating their student's rights under § 504 and the ADA to be free of discrimination — the statutory emphasis on otherwise available "rights, *procedures, and remedies*" makes that clear. *Id.* § 1415(*l*) (emphasis added).

C. The IDEA, and Its Requirement of a Free Appropriate Public Education, Is Not the Sole Legal Protection Afforded to Students with Disabilities

Students with disabilities are entitled to a school environment that is free from discrimination — whether or not they need specialized instruction or related services under the IDEA.

The IDEA, as the Ninth Circuit's *Payne* decision recognized, "is not intended to temporarily shield school officials from all liability for conduct that violates constitutional and statutory rights that exist *independent* of the IDEA and entitles a plaintiff to relief *different* from what is available under the IDEA." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 876 (9th Cir. 2011) (en banc), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir.) (en banc), *cert. denied*, 135 S. Ct. 403 (2014); *see also Moore v. Kansas City Pub. Schs.*, ___ F.3d ___, 2016

WL 3629086, at *4 (8th Cir. July 7, 2016) (agreeing with *Payne*). The "IDEA and Title II [of the ADA] differ in both ends and means," and, while the IDEA set the "floor of access to education," Title II and its implementing regulations "require public entities to take steps towards making existing services not just accessible, but *equally* accessible to people with . . . disabilities." *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013); *see also Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 198, 201 (1982) (noting that the IDEA's requirement to provide special education services does not equate to providing "equality of opportunity or services").

The ADA and the Rehabilitation Act thus provide protections that often will not implicate the rights granted under the IDEA. To provide just one example, if a school district bars a student with a disability from participating in field trips or extracurricular activities — even though reasonable accommodations are available — that school district has discriminated against that student in violation of § 504 and the ADA. And that is true even if it has done nothing to implicate the student's IEP or academic curriculum.[4]

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[4] The U.S. Department of Education's Office of Civil Rights ("OCR") has issued administrative decisions *under § 504 of the Rehabilitation Act* concerning the circumstances under which a school district must accommodate students with disabilities so that they can participate in field trips and extracurricular activities. *See, e.g., Williamstown (MA) Pub. Schs.*, 39 IDELR 43 (OCR 2003) (school district required under § 504 to provide properly trained aide to accompany student with cerebral palsy on field trip); *Quaker Valley (PA) Sch. Dist.*, 39 IDELR 235 (OCR 1986) (school district required under § 504 to accommodate student with neuro-degenerative disorder who wanted to join swim team).

In this same vein, the Fry family had an interest in preventing discrimination regarding the use of their child's service dog irrespective of whether the school's actions violated the IDEA. As Judge Daughtrey pointed out in her dissent below, the barrier to E.F. using her service dog at school was not her IEP; the issue, rather, was the school district's policy to permit only "guide dogs," not "service dogs," on school grounds. Pet. App. 23 (Daughtrey, J., dissenting); *see also id.* at 27 (noting that the Frys' "request could be honored *simply by modifying the school policy allowing guide dogs to include service dogs*").

As alleged in the complaint, the school district violated federal anti-discrimination law by refusing to modify its service animal policy to accommodate E.F. *See id.* at 33-34 ("'Th[e] evidence suggests that refusing to allow the service animal to assist the Student at school, which she is required to attend for nine months a year, would result in a more prolonged and complete separation that would likely cause the Student's working relationship with the service animal to deteriorate.'") (quoting letter from the Director of OCR) (alteration in original). Through the ADA and § 504 of the Rehabilitation Act, Congress provided a private right of action and a damages remedy for that alleged violation.

D. The Court of Appeals' Decision Imposes Unfair Burdens on Students with Disabilities Receiving Special Education Services

The Sixth Circuit's decision inappropriately imposes an obligation on E.F. that a similarly situated student who was not eligible for special education services under the IDEA would not face. If E.F. were not an eligible student under the IDEA — and therefore had no need for an IEP — respondents could

not reasonably dispute that the Fry family could challenge the school's exclusion of her service dog under the ADA and the Rehabilitation Act, without exhausting the IDEA's administrative procedures.

As the Ninth Circuit stated in *Payne*, "[w]e do not think that the IDEA's exhaustion requirement was intended to penalize disabled students for their disability. This is not what § 1415(*l*) says, and we think it is not what Congress intended." 653 F.3d at 881. By preserving all rights and remedies under federal anti-discrimination law *except* in those circumstances where a party seeks "relief that is . . . available" under the IDEA, the statute makes clear that a student with a disability who requires specialized instruction maintains an equal right to challenge unlawful discrimination that cannot be addressed through the remedies available under IDEA.

II. AFFIRMING THE PLAIN LANGUAGE OF THE IDEA'S SAVINGS PROVISION WILL PROMOTE, NOT DISCOURAGE, EFFICIENT RESOLUTION OF DISPUTES

A. Parents of Children with Disabilities Seeking Education Services for Their Children Under the IDEA Have No Incentive To Bypass Administrative Procedures

In *amici*'s long experience working in the field of special education, they have found that parents of children with disabilities who need special education services are first and foremost concerned that their children receive services that will effectively address their children's needs. When parents are able to secure those services, they have no reason to seek further relief in court.

Parents are also aware that the only way to receive desired special education services — and secure a better education for their child — is to participate in the creation of their child's IEP and, should they disagree with the results, in the IDEA's administrative process. *See* 20 U.S.C. §§ 1414(d)(3)(A)(ii) (stating that school officials must consider a parent's request for particular educational programs or services in creating a student's IEP), 1415(f)-(i) (outlining the administrative remedies parents must exhaust before filing a lawsuit). In the vast majority of cases involving the denial of an academic or supportive service for a student with a disability, parents will not attempt to launch litigation; they will participate in and exhaust the IDEA's administrative remedies in hopes of obtaining that service for their child.

Only when a parent is not seeking a remedy available under the IDEA does the parent have an incentive to turn to other potential remedies. That is what occurred here: When the school district denied E.F. the use of her service animal, her parents participated in a "specially convened IEP meeting" and subsequently worked with the school to implement "a trial period, to last until the end of the school year, during which E.F. could bring [the service animal] to school." Pet. App. 3-4. When the school district told the Frys that the service animal would not be allowed to attend school with E.F the following year, the Frys removed E.F. from school but continued to seek relief through administrative channels, by filing an administrative complaint with OCR. *See id.* at 4. It was only when the Frys decided to enroll E.F. in a school that welcomed the service animal — at which point administrative relief from E.F.'s old school

would have served no purpose — that they filed this lawsuit. *See id.*

The Frys did not attempt to bypass informal resolution of the dispute. Rather, they collaborated with the school district in hopes of ensuring that E.F.'s service animal could attend school with her. When that collaboration failed, they still did not immediately sue, but rather availed themselves of an administrative process to get the educational benefit they desired. But when E.F. received all that she wanted — and needed — in her new school district, there was no longer any reason for her parents to continue the informal and administrative processes with the school district. The only thing remaining for her parents to do was to seek compensation for the discrimination E.F suffered.

B. The Office of Civil Rights Offers an Informal Mechanism To Resolve Claims of Discrimination Between Parents and Schools

Even when the administrative mechanisms of the IDEA are inapplicable, parents tend to forgo litigation in cases of discrimination in school and instead to pursue an informal remedy though the U.S. Department of Education's Office of Civil Rights ("OCR"). This informal remedy is available to parents through the simple act of filing a complaint with OCR, which enforces the ADA and § 504. *See* U.S. Dep't of Educ., *About OCR*, http://www2.ed.gov/about/offices/list/ocr/aboutocr.html (last modified Oct. 15, 2015).

OCR has a 40-plus-year history of intervening as an effective and efficient enforcer of the non-discrimination rights of students with disabilities. *See* Catherine D. Anderle, *Helping Schools Make the*

Grade, Mich. B.J., Feb. 2001, at 52, 53 (OCR senior attorney describing complaint process and stating that "OCR's goal is to resolve complaints as soon as possible," most often through negotiated and amicable agreements).

When parents contact OCR with complaints of discrimination against their children, they do not need a lawyer. OCR operates as a "neutral fact-finder," U.S. Dep't of Educ., *How the Office for Civil Rights Handles Complaints*, http://www2.ed.gov/about/offices/list/ocr/complaints-how.html (last modified July 20, 2016), and often contacts school administrators directly to negotiate a solution informally and without litigation.

In *amici*'s experience, the OCR complaint process is typically much more efficient than either the IDEA's administrative due process protocols or resorting to litigation. Like litigation, administrative due process hearings often entail representation by counsel, resort to experts, and elaborate submissions. The OCR complaint process requires none of that. In most cases that come to OCR, the issue can be quickly and informally resolved, saving resources for schools and parents alike. It is not surprising that the complaint process is popular among parents, including as an alternative to litigation.

Children have the right to attend school in an environment that is free from discrimination. For most parents, the OCR complaint process is the fastest, most efficient, and most attractive way to achieve that goal, after direct engagement with the school system has failed.

C. Parents Rarely Go to Court, and a Ruling for Petitioners Will Not Change That

In the experience of *amici*, the rare cases in which parents do go to court involve discrimination that persisted despite repeated efforts to resolve concerns through less formal means. There is no reason to think that such cases will be frequent. And it is clear that — as the plain wording of § 1415(*l*) reflects — Congress intended to preserve a remedy in such cases.

Amici have been on both sides of disputes over access to special education services as well as disputes over discrimination by schools that do not implicate the remedies provided under the IDEA. The interests of students and of educators are best served — and the rights of students under federal law best respected — when the distinct remedial schemes of distinct federal statutes retain their separate and important roles.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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